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BRIEF OF PLAINTIFF IN ERROR

ON MOTION TO DISMISS.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 133.

CONRAD WECKER, PLAINTIFF IN ERROR,

vs.

THE NATIONAL ENAMELING AND STAMPING COMPANY AND GEORGE WETTENGEL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

EDWARD C. KEHR,
Attorney for Plaintiff in Error,
with him on the Brief,
RICHARD T. BROWNRIGG,
AND WILLIAM L. MASON.

[19,932.]

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STATEMENT.

Counsel for defendants have filed a motion to dismiss the writ of error.

There has not been at the time of the preparation of this brief a compliance with the requirements of rule six of this court with reference to serving notice of motions to dismiss. Unless proper evidence of compliance with that rule shall have been furnished prior to the submission of the motion, we object to its consideration by the court. We do not know when it is proposd to submit the motion.

Since the printing of this brief, we have been served with notice of the motion. Notice was served November 12, 1906.

The motion to dismiss alleges two grounds:

1. That there has been no final judgment.

2. That there are other questions in issue before the court than the question of jurisdiction.

The plaintiff's motion to remand having been overruled when the case was called for trial, plaintiff refused to submit to the jurisdiction of the court below, and the court thereupon dismissed his suit and entered judgment against the plaintiff that he "take nothing by his suit in this behalf and that the defendants, National Enameling and Stamping Company, a corporation, Harry Schenck and George Wettengel, go hence without day and recover of the said plaintiff their costs and charges herein expended." (Trans., p. 20.)

The defendant Wettengel filed a demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. This demurrer was sustained, and plaintiff sets forth in his specifications of error (trans. p. 23) the sustaining of this demurrer as error. Because of the fact that this is set forth as a specification of error, defendants contend that the jurisdictional question is not the sole question in issue, and that, therefore, this court has no jurisdiction.

It would seem that both of these contentions of defendants in error are conclusively settled against them by the case of Powers v. Chesapeake & Ohio Ry., 169 U. S. l. c. 95. In that case, just as in this, plaintiff in his suit for personal injuries had joined with a non-resident corporate defendant an individual defendant residing in the same State with himself. The case had been removed to the United States Circuit Court. Plaintiff had made a motion to remand, which motion was overruled. The court also sustained a demurrer to plaintiff's petition. When the case was called for trial, plaintiff refused to recognize the jurisdiction of the court or to offer any evidence. Judgment was rendered against him and the jurisdictional question was certified to this court. This court, in that case, entertained and passed upon the question as to whether or not the court below had jurisdiction. It seems to us that the case cited is absolutely parallel with the one at bar, and conclusively settles in our favor both points raised in the motion to dismiss.

The case of Colorado Eastern Ry. Co. v. Union Pacific Ry. Co., 94 Fed. 313, was a case in which the court below had dismissed the suit for failure to duly prosecute the same, and entered judgment for costs against the plaintiff in error. This judgment was appealed from. Defendant in error moved to dismiss on the ground that there had been no final judgment. The court held:

> "The motion must be denied. An order of dismissal for want of prosecution and judgment for costs against plaintiff is a final judgment from which an appeal will lie. (Citing authorities). To constitute a final judgment, it is not essential that it should be a bar to another suit."

The opinion was rendered by Judge Caldwell of the Circuit Court of Appeals for the Eighth Circuit, and was concurred in by Judge Sanborn and Judge Thayer.

In the case at bar, the judgment is even more clearly final than the one in the case last cited. The case at bar came on for trial. Plaintiff refused to recognize the jurisdiction of the court and introduced no testimony. Judgment was rendered against him and execution ordered in defendants' favor. There is no difference upon principle between a judgment so rendered where no evidence is offered by plaintiff and a judgment rendered agaist him where his evidence is insufficient.

The contention that this court can not entertain jurisdiction of this writ of error because there are other questions in issue than the question of the jurisdiction of the court below is clearly not well taken. In the first place, the demurrer of Wettengel was sustained by the court below on the ground that the complaint stated no cause of action against Wettengel. As the complaint undertook to state a cause of action against Wettengel and the National Enameling and Stamping Company, the jurisdiction of the United States Circuit Court depended upon the question as to whether or not the petition stated a cause of action against both Wettengel and the Stamping Company or a cause of action against the Stamping Company alone. At least, that was the theory upon which the court below decided the question as to its jurisdiction. In deciding that the petition states no cause of action against Wettengel, the court below reached a conclusion as a result of which it sustained its jurisdiction. Therefore, the jurisdictional question in this case is inseparably connected with the question as to whether or not the petition states a cause of action against Wettengel. Hence, in setting out the overruling of Wettengel's demurrer as a specification of error, plaintiff in error did not complain of the action of the court below upon any other matter than a jurisdictional question. The fifth specification of error, to the effect that the court erred in sustaining the demurrer of the defendant Wettengel, was not, as counsel for defendants state, omitted among the specifications of error set forth in our brief through mistake. It was purposely omitted, because it was regarded by counsel as a mere repetition of the third specification of error, which is that the court erred in holding that plaintiff's complaint herein discloses but one cause of acton, and that against the defendant corporation. (See trans. p. 23).

In the second place, even though other issues had been passed upon by the court below than those having reference to its jurisdiction, that fact would not affect the right and duty of this court to pass upon the question of the jurisdiction of the court below, because that question is clearly certified and is the only question which is certified by the court below to this court for its considertion. (See certificate, trans. p. 22).

Even if it were true that the assignment of errors specifies other action of the court below than its action on the jurisdictional question, that fact could not affect the right and duty of this court to pass on the jurisdictional question thus brought before it.

In the case of U. S. v. Jahn, 155 U. S. 109, other questions than the jurisdictional question were passed upon by the court below and its action upon other than such questions was assigned as error, because the jurisdictional question was not raised at all until the case reached the Circuit Court of Appeals. But the jurisdictional question was certified to this court and decided by it. In the recent case of Ala. Great Southern v. Thompson, 26 Sup. Ct. Rep. 161, it also appears that the action of the court below upon the entire case was appealed from and that the jurisdictional question alone was certified. It is true that the case at bar comes to this court under section 5 of the act of March 3d, 1891, while the two cases last cited were certified under section 6 of the act. But whether a case be brought to this court under the one section or the other, it is not the assignment of errors but the certificate which determines the jurisdictional question brought before this court for review. As already pointed out in U. S. v. Jahn it is not even necessary that the jurisdictional question appear in the assignment of errors.

Counsel for defendants in support of the motion to dismiss, cite the case of McLish v. Roth, 141 U. S. 661. It seems to us that the case is not at all in point. In that case, a demurrer to the jurisdiction of the United States Circuit Court had been overruled. Whereupon without any judgmeut having been entered in the case at all, defendant undertook to have this court pass upon the jurisdictional question. It was conceded that there had been no final judgment, and contended that under the statute no final judgment was necessary in order that this court might review the jurisdictional question. But it was held by this court that the jurisdictional question could not be determined by it until after final judgment.

Upon the foregoing authorities and reasoning, we conclude first, that the judgment appealed from is clearly a final judgment; second, that the assignment of errors specifies error upon no other than a jurisdictional question. But, even if the latter proposition were not true, it could make no difference here, because the certificate of the court below specifies the jurisdictional question and that alone.

Respectfully submitted,

EDWARD C. KEHR,
Attorney for Plaintiff in Error,
with him on the Brief,
RICHARD T. BROWNRIGG, AND
WILLIAM L. MASON.